

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ALLEN SELLERS,

Defendant-Appellant.

UNPUBLISHED

April 27, 2010

No. 290187

Berrien Circuit Court

LC No. 2008-411644-FC

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b, and one count of second-degree criminal sexual conduct, MCL 750.520c. He was sentenced to concurrent terms of fifteen to thirty years in prison on each of the CSC-1 counts and seven to fifteen years on the CSC-2 count. He now appeals and we affirm.

Defendant has filed briefs both through counsel and in propria persona. The sole issue raised by counsel is that he was denied a fair trial due to prosecutorial misconduct during closing argument. Specifically, defendant argues that the prosecutor improperly denigrated defense counsel and improperly shifted the burden of proof to the defendant to discredit the complainant's credibility.

Defendant failed to preserve this issue for appeal by making an objection. Therefore, we review the issue for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The only "denigration of defense counsel" identified in defendant's argument is a reference to it being "a common technique" among defense counsel to try and get the jury "to look over here—look over here—look over here. Let's-let's get you focused on here. . . . Let's look at somebody else because we don't want you to actually look at the damning evidence against the Defendant." We are not persuaded that this constitutes plain error affecting defendant's substantial rights.

With respect to defendant's claim that the prosecutor attempted to shift the burden of proof to defendant to discredit the complainant's credibility, we again fail to find any plain error. Defendant's relatively brief argument on this point seems to be based on two points: that the prosecutor improperly argued that the jury must have a reason to doubt defendant's guilt and that defendant did not meet his burden to show why the victim might be lying. But the prosecutor made no such argument. In rebuttal, the prosecutor did address the defense argument that there was reasonable doubt regarding defendant's guilt. In addressing whether there was reasonable

doubt that the victim was telling the truth, the prosecutor did state the doubt “has to be reasonable.” The prosecutor then went on to address whether there was any reasonable doubt regarding the victim’s testimony and argued that there was no basis to conclude that the victim was lying. The prosecutor did not suggest that defendant had any burden to prove that she was lying.

Finally, defendant argues that defense counsel at trial was ineffective for failing to make an objection to the above matters. Because defense counsel is not required to make meritless objections, and any objection to these matters would have been meritless, counsel’s performance was not deficient. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We turn next to defendant’s pro per brief, which argues that the prosecutor engaged in misconduct by presenting false testimony. Defendant correctly argues that a prosecutor may not knowingly present false testimony. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Defendant, however, fails to establish that the prosecutor knowingly presented false testimony. At most, defendant points out inconsistencies in witness testimony. And mere inconsistencies in testimony are not adequate to establish that the prosecutor knowingly presented false testimony. *People v Lester*, 232 Mich App 262, 278-279; 591 NW2d 267 (1998); *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Indeed, in *Canter* the witness had later recanted her testimony, but this Court concluded that there was no basis to conclude that the prosecutor knowingly presented false testimony. To the extent that there was conflicting testimony, defendant was free to argue to the jury that these conflicts raised doubts about the accuracy of the testimony, but it does not establish any misconduct by the prosecutor.

Defendant also argues that the prosecutor improperly impeded the cross-examination of the victim. The record, however, establishes that the prosecutor was alerted that the witness needed to use the restroom, based upon the victim signaling such a need to her mother, and that was the purpose of the break. It was further established on the record after the break that no conversations occurred with the victim during that break regarding her testimony. We see nothing improper in the prosecutor seeking a break for a 10-year-old victim to use the restroom.

Because neither of defendant’s arguments in his pro per brief have merit, neither does his argument that counsel was ineffective for failing to object on these grounds at trial.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O’Connell